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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1920

ANGELO RUGGIERO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EUGENE GRESSMAN
1828 L Street, N. W.
Washington, D. C. 20036

ROY M. COHN
MICHAEL ROSEN
39 East 68th Street
New York, New York 10021

Counsel for Petitioner

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Three questions are presented on this appeal from a conviction for stealing an interstate cargo of freight:

(1) Whether the Third Circuit violated due process principles in ignoring the issues decided by the trial court and affirming the conviction on a ground rejected by the trial court;

(2) Whether the trial court effected an unconstitutional amendment of the indictment by resting conviction on an element of the crime not alleged by the grand jury;

(3) Whether the prosecution was barred under the Fifth Amendment because of outrageous conduct by a government agent.

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The petitioner, Angelo Ruggiero, respectfully requests that a writ of certiorari issue to review the judgment order, entered on February 20, 1974, by the United States Court of Appeals for the Third Circuit in this proceeding.

OPINIONS BELOW

The judgment order of the Third Circuit, reprinted in the appendix hereto (p. 1a. *infra*), is reported at 492 F.2d 1239, sub nom. *United States* v. *Farley.*

The memorandum opinion and order of the United States District Court for the Middle District of Pennsylvania, reprinted in the appendix hereto (p. 3a, *infra*), has not yet been reported.

JURISDICTION

Following a non-jury trial, petitioner was found guilty on December 17, 1972, by the District Court of the theft of goods from a shipment of freight in interstate commerce, in violation of 18 U.S.C. § 659 and § 2. The District Court overruled certain post-trial motions on May 15, 1973, issuing the memorandum opinion that appears in the appendix hereto. The District Court's final judgment and commitment were entered on July 26, 1973.

On February 20, 1974, the Third Circuit issued its judgment order affirming the conviction. On March 21, 1974, the Third Circuit granted leave to file a petition for rehearing out of time, allowing 20 additional days from March 21 for such a filing. The petition for rehearing was duly filed within the period specified by the Third Circuit. And on April 24, 1974, the Third Circuit denied the petition for rehearing on its merits. See p. 2a, *infra*.

On timely application, Mr. Justice Brennan on May 13, 1974, signed an order extending the time for filing this petition to and including June 22, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal appellate court, consistently with the principles of constitutional due process and of proper administration of criminal justice, can review a federal criminal conviction by ignoring the issues determined in the trial court and by affirming the conviction on a ground rejected by the trial court, sitting without a jury.

2. Whether an unconstitutional amendment of an indictment was effected by the action of a federal trial court in (a) finding that the Government had failed to prove that an interstate cargo had been stolen from a "station" in violation of 18 U.S.C. § 659, as alleged by the grand jury, and (b) resting conviction on proof that the cargo had been stolen from a "motortruck" in violation of 18 U.S.C. § 659, which had not been alleged by the grand jury.

3. Whether a federal prosecution should be barred under the Fifth Amendment, or whether the defense of entrapment should be allowed, where (a) a government informer plays a more than passive role in the commission of the crime, directing, planning and helping execute the crime, (b) the defendant has denied his guilt, and (c) the defendant has not been shown to have played an active role with the other co-defendants participating with the informer in the commission of the offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

United States Code, Title 18, § 659:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house,

platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; . . .

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

Petitioner, Angelo Ruggiero, and three others—Farley, Flammia and Rini—were indicted on a charge of the theft of goods from a shipment of freight in interstate commerce, in violation of 18 U.S.C. § 659 and § 2. In pertinent part, the single-count indictment alleged:

"That on or about the 21st day of June, 1971, at North Lebanon Township, Lebanon County, Commonwealth of Pennsylvania, . . . Angelo Ruggiero did knowingly, wilfully and unlawfully and with intent to convert to their own use, steal, take and carry away *from a station, station house and depot,* chattels of a value in excess of $100.00, that is 1426 cases of foodstuffs, which were moving as, and constituted an interstate shipment of freight . . ." [Emphasis added.]

On December 15, 1972, the District Court, sitting without a jury, adjudged petitioner guilty of this charge, and he was subsequently sentenced to five years imprisonment. The Third Circuit, on February 12, 1974, affirmed the District Court's judgment and commitment.

A. The Various Shifts in the Alleged Crime

Section 659 of Title 18 makes it unlawful to steal or carry away an interstate shipment of freight from, *inter alia,* (1) "any railroad car, wagon, motortruck, or other vehicle," or (2) "any station, station house, platform or depot." In this case, the grand jury charged only that the petitioner and his co-defendants had stolen the freight shipment "from a station, station house and depot." The indictment did not charge that the shipment had been stolen from a "motortruck, or other vehicle."

Petitioner's trial and conviction by the District Court were premised on the grand jury's allegation that the theft had been "from a station, station house and depot." But in the course of the District Court's memorandum opinion denying various post-trial motions filed by petitioner, the District Court found that the evidence produced by the Government had not established that the theft occurred from a station, station house or depot. See p. 6a, *infra.*

The District Court simultaneously found that the evidence did show that "an unlawful taking from a 'motortruck' occurred." See p. 8a, *infra.* There was thus found a variance between the grand jury's charge respecting a "station" and the Governments proof at trial respecting a "motortruck." The District Court, however, labelled the variance a harmless error, and denied petitioner's claim that there had been an unconstitutional constructive amendment to the indictment.

The evidence giving rise to this variance showed that an interstate shipment of spaghetti sauce had been con-

tained within the trailer of a motortruck, en route from Delaware to New York. The truck was left parked on a private lot (owned by Lesher's Mack Truck Sales and Service Co.) for a weekend in Lebanon, Pennsylvania, while the driver visited at his home near Lebanon. The owner of the shipment and the employer of the driver, Gioia Specialty Foods, Inc., was not shown to have known that the truck would be parked on that particular private lot; nor had it authorized the driver to park there. And there was no evidence that Gioia Specialty Foods had made any prior arrangement with the private lot owner to utilize the lot to park its trucks. The lot owner simpy permitted parking on the lot as an accommodation to various truck drivers stopping at Lebanon en route to other destinations.

The theft occurred on a Sunday evening on the weekend in question. The trailer and its contents were removed from the private lot by two of petitioner's co-defendants. Those two co-defendants had proceeded for about two miles before they were stopped and arrested. The goods were not removed from the truck at any point. The petitioner played no role in removing the truck from the private lot; his alleged relationship to the crime was that of an aider and abettor.

These facts led the District Court to conclude that the private parking lot was not a "station" or "station house" as those terms are used in § 659. See pp. 7a-8a, *infra*. The court accordingly rejected the Government's contention that a truck is "stationed" wherever it is parked, and that any place that the driver might have parked this truck during the weekend interlude constituted an interstate facility or "station." To be such a facility or station, said the court, the facility "at the

least must be owned, leased or authorized by the firm engaged in transportation in interstate commerce and used in the normal course of its business." See p. 8a, *infra*.

Petitioner's conviction was thus reaffirmed by the District Court on the new theory that the proof showed that the theft occurred from a "motortruck" rather than from a "station," the variance being deemed immaterial. But on the appeal, the Third Circuit rejected the District Court's new theory of the crime. In footnote 3 of its judgment order, the Third Circuit without elaboration stated: "We believe that it is not an unreasonable construction to conclude, under the circumstances here, that there was a theft from a 'station.'" See p. 2a, *infra*. Petitioner's conviction was accordingly affirmed on the appeal on a basis rejected by the District Court, the trier of the facts.

B. The Activities of the Government's Informer

The Government's chief witness was one Robert Bush, a conceded informer and an alleged agent provocatur. Bush regarded himself as working with the F.B.I., and because of the information that Bush fed to the F.B.I., all of the actions surrounding the taking of the trailer truck from the parking lot were under the surveillance of F.B.I. agents and other law enforcement men.

Petitioner's alleged involvement in the scheme was at most tangential and highly debatable, the District Court calling it "the subject of a serious factual dispute." See p. 13a, *infra*. That dispute was resolved by the court by disbelieving petitioner's testimony and by crediting the contrary testimony of Bush, the informer. At the

core of this factual dispute was an alleged meeting between petitioner and Bush in a motel on the date of the hijacking, in the midst of the co-defendants' futile efforts to start the parked truck. Bush, despite an initial difficulty in identifying petitioner as the one with whom he spoke, testified that petitioner had there offered him extra money if he would help get the truck started.[1] Petitioner denied that any such conversation took place.

Bush not only helped get the truck started but played a key role in the development and execution of the entire hijacking operation. Bush and the co-defendant Farley had originally met each other in 1970 in New York, at which time Bush agreed to deliver to Farley for hijacking a truckload of Sears batteries consigned to Bush. That theft, as to which Bush had pre-arranged F.B.I. surveillance, did not come off, since Farley did not believe the batteries were marketable. Farley and Bush remained in contact with each other through June of 1971. During that time, according to Bush, Farley repeatedly asked Bush to point out other truckloads of commodities that could be stolen in transit.

At a meeting with the three co-defendants on June 19, 1971, petitioner not being present, Bush told the three that he could point out a truckload of Bulova Acutron watches. On the following day, Bush came to a financial agreement with the co-defendant Flammia. Bush reported all these arrangements to the police, as well as to the truck driver. As Bush knew, the truck contained spaghetti sauce, not Acutron watches. He instructed

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[1] Bush testified that he had never seen or spoken to the petitioner Ruggiero before this motel meeting on June 20, 1971, the date of the hijacking. Bush did not know where petitioner fitted into the hijacking operation.

the driver to leave the truck parked over the weekend at the private lot in Lebanon and to stay away from the truck during that time. The F.B.I. was made fully aware of this plot and knew that Bush had lied to the co-defendants about the contents of the truck.

At another meeting with the three co-defendants, Bush was paid $2,000 by Flammia and was promised more money after the goods were delivered in New York. Bush also received $400 from the F.B.I. shortly after the events in question.

The three co-defendants were unable to start the truck when they arrived at the parking lot, despite Bush's assistance. It was at this point that the contested meeting occurred between Bush and the petitioner. Bush thereupon secured the stealing of another tractor and substituted it for the one which had been attached to the trailer containing the spaghetti sauce. The co-defendants thus were able to drive the truckload away from the parking lot. The F.B.I. agents and local police, who had the entire operation under surveillance, brought the project to an end by stopping and arresting the co-defendants after they had driven the truckload several miles.

The co-defendant Farley testified that the whole project came about at the instance of Bush, who invited Farley to see him because he had something that would take Farley out of his financial difficulties (536a).[2] Farley stated that Bush had offered to point out the truckload of Acutron watches at the June 19 meeting

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[2] The co-defendants Flammi and Rini chose not to testify at the trial. The petitioner and Farley were the only defendants who took the stand.

for $5000 (538a), and that the final arrangement was that Bush was to get $5,000 in advance and a later balance of $95,000 (572a). Each of the three co-defendants (Farley, Rini and Flammia) was to receive $100,000 from the operation (572a). Arrangements were then made to meet the next day at a diner near Lebanon, from which the hijacking party would proceed to the parking lot (541a).

The petitioner Ruggiero was not involved in any of these meetings between Bush and the three co-defendants. Indeed, Farley did not even know the petitioner. Only Rini knew petitioner, and Rini cautioned Farley not to mention anything in front of the petitioner (580a). According to the petitioner, he had met Rini by coincidence in a New York bar and told him that he wanted to go to Pennsylvania to pick up his wife and children, but had no driver's license. Rini told petitioner that he happened to be going to Pennsylvania the next day on business and offered to drive petitioner first to where Rini was going and then to petitioner's destination in the Poconos. (593a). It was petitioner's testimony that he had no knowledge of, or interest in, the hijacking operation, and that his presence near the operation was an innocent coincidence (602a, 608a). Petitioner's account of his presence in Lebanon was found by the District Court to be unworthy of belief (651a).

Based upon the foregoing facts, the claim of entrapment was raised by the petitioner in seeking a judgment of acquittal. That claim was denied by the District Court in its post-trial memorandum opinion (see pp. 18a-24a, *infra*), and that denial was expressly affirmed by the Third Circuit on the appeal. The District Court

premised its denial of the entrapment defense upon the following considerations:

(1) Since petitioner had denied his guilt and his involvement in the crime, it would be inconsistent for him now to contend that he was involved in the criminal enterprise but was impermissibly induced to participate by the overreaching of a government agent. See pp. 18a-19a, *infra*.

(2) Petitioner was here found to face "another serious hurdle" in that "[t]here is nothing in the record indicating the circumstances under which [petitioner] Ruggiero may have become involved in this crime." See p. 21a, *infra*. Nothing indicated that petitioner had any direct contact with the informer Bush before the date of the hijacking or that he was directly induced by the acts or remarks of Bush.[3] In such circumstances, said the court, "it is still unclear whether Ruggiero can raise the defense of entrapment." See p. 22a, *infra*.

(3) But the District Court agreed that the entrapment issue could be raised by petitioner on his motion for judgment of acquittal if the Government's evidence established the existence of entrapment as a matter of law. But on that basis, the District Court could find no entrapment. In reliance on this Court's decision in *United States* v. *Russell*, 411 U.S. 423 (1973), the District Court concluded that none of petitioner's codefendants had been entrapped since they had previously manifested an unsolicited predisposition to steal

[3] The court stated that it "would have to surmise that Farley, Flammia or Rini conveyed Bush's remarks to Ruggiero before we could conclude that Ruggiero might have been indirectly induced by the acts of Bush." See pp. 21a-22a, *infra*.

cargo. Said the court: "The testimony of Bush clearly establishes that the criminal design originated with Ruggiero's co-defendants and not with Bush . . . they were not innocent persons corrupted by the overreaching of governmental agents." See pp. 22a-23a, *infra*. While Bush was found to have played more than a passive role in the commission of the crime, the court rejected any claim that his actions shocked "the universal sense of justice." See p. 24a, *infra*.

(4) Finally, "under the present record it would be incongruous to find that Ruggiero was entrapped without first concluding that his co-defendants were entrapped. If the defense fails as to the latter [as the court so held] it must fall as to the former." See p. 22a, *infra*.

REASONS FOR GRANTING THE WRIT

1. A constitutional due process problem is created by the Third Circuit's action in appraising and affirming the conviction in disregard of the statutory issues as determined by the District Court.

An important ingredient of constitutional due process is a defendant's right to have his conviction appraised on appeal "on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U.S. 196, 202 (1948). As that principle was applied in *Cole*, a state supreme court was held precluded from affirming convictions as though the defendants had been tried and convicted for having violated § 1 of a state statute, when in fact the defendants had been charged, tried and convicted only for violating § 2 of the same statute.

Here we have somewhat more bizarre fluctuations among the charge, the trial, the conviction and the

affirmance. But the constitutional principle epitomized by *Cole* v. *Arkansas* would seem no less demanding, particularly when translated into a rule of administration of criminal justice in the federal courts.

This petitioner was charged and tried in the District Court on the grand jury's allegation that he engaged in the theft of an interstate cargo only from a "station" or "station house," in violation of 18 U.S.C. § 659. But the District Court, sitting without a jury, found that the Government had not proved that the facility from which the cargo was stolen—which facility is an essential element of the offense—was a "station" or a "station house." Rather, the District Court concluded that the Government's proof showed that the theft occurred from a "motortruck," a facility not mentioned in the indictment. The District Court, while denying that this variance between the charge and the proof was material or constituted an unconstitutional amendment of the indictment, proceeded to rest the petitioner's guilt on the proof that he had stolen the cargo from a "motortruck." In effect, the District Court acquitted the petitioner, for lack of proof by the Government, of the charge that he stole from a "station" or "station house."

Yet the Third Circuit did not appraise the District Court's shift to the "motortruck" theory of guilt, with all of its constitutional problems of variance as frankly discussed by the District Court. The Third Circuit ignored the issues as "determined in the trial court," *Cole* v. *Arkansas, supra,* and expressly rested its affirmance on its own belief—contrary to the District Court's belief on which the conviction rested—"that it is not an unreasonable construction to conclude, under the cir-

cumstances here, that there was a theft from a 'station.' " See p. 2a, fn. 3, *infra.*

Was not petitioner thereby deprived of his constitutional due process right to have his conviction appraised on the appeal in terms of the critical fact issues as determined by the District Court? Does not the *Cole* v. *Arkansas* principle apply to federal appellate courts? Does not the proper administration of federal criminal justice demand that the Third Circuit's action in this regard be reviewed and reversed?

To put one final question in this regard: For what crime does petitioner now stand as convicted, stealing from a "station" or stealing from a "motortruck"?

2. Resting petitioner's conviction on the proof that he stole cargo from a "motortruck" is in direct conflict with this Court's decisions respecting the constitutional invalidity of amending a grand jury indictment.

To the extent that the District Court's determination of guilt respecting the taking from a "motortruck" can survive the Third Circuit's improper review and revision of the conviction, that determination comes squarely into conflict with two controlling decisions of this Court: *Ex parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960). See also *Russell* v. *United States,* 369 U.S. 749, 770-771 (1962).

Bain held that a trial court cannot, consistent with the Fifth Amendment, formally and literally strike an essential portion of the indictment as returned by the grand jury.[4] *Stirone* held that a court can neither

[4] In *Bain,* the trial court had struck out the words "Comptroller of the Currency and" from the language of the indictment charging the making of false statements "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association."

change nor add to the indictment by way of admission of evidence of an alternative element of the crime that the grand jury has not alleged.[5] And *Stirone* further made it clear, 361 U.S. at 217-218, that:

> "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same . . . While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by the grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error . . . The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

In the instant case, the petitioner was charged by the grand jury with a specific kind of violation of 18 U.S.C. § 659. That section has been described as "a technical one and requires the Government to prove the allegation that the goods were stolen from one of various enumerated places." *United States* v. *Allegrucci* 299 F.2d 811 (3rd Cir. 1962). The designation in the indictment of one of the various facilities or places enum-

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[5] In *Stirone*, the indictment only charged the defendant with having caused the movement of sand in interstate commerce "from outside the State of Pennsylvania into the State of Pennsylvania." The trial court admitted evidence and charged the jury respecting (1) the movement of sand into Pennsylvania from other States *and* (2) the shipment of steel from Pennsylvania into Michigan and Kentucky. Such an introduction of element (2) into the case was held to create not only a variance but an unconstitutional amendment of the indictment.

erated in § 659 is considered to be an essential ingredient of the crime. "Under this statute, it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes." *United States* v. *Manuszak,* 234 F.2d 421, 423 (3rd Cir. 1956).

And so it was of critical importance that the grand jury carefully mentioned only the "station, station house and depot" designations of § 659 in describing the crime ascribed to petitioner. He was not charged with the other federal crimes mentioned in § 659 of stealing cargo from

(1) "any railroad car, wagon, motortruck, or other vehicle," or

(2) "any steamboat, vessel, or wharf," or

(3) "any aircraft, air terminal, airport, aircraft terminal or air navigation facility."

So, when the District Court found that the Government had failed to prove that a "station" was here involved but that petitioner's guilt could rest on the Government's proof that the theft was from a "motortruck," did not the District Court in effect amend the indictment in the *Stirone* sense? How can the grand jury be said to have charged petitioner with having stolen a cargo from a "motortruck," any more than from an "airplane"? And was not petitioner constitutionally entitled to have his guilt assessed solely in terms of having stolen from a "station"?

If this was truly an amendment of the indictment, the *Stirone* decision invalidates the District Court's effort

to brush the matter aside as a mere variance or harmless error. And in the context of a technical statute, carefully defining various interstate facilities to identify the federal nature of the crimes, it would not appear decisive that the facts presented to the grand jury may have embraced a theft both from a "station" and a "motortruck." Indeed, the grand jury's omission of a "motortruck" from the indictment may reflect the grand jury's careful conclusion that the facts did not warrant charging a theft from a "motortruck."

Moreover, even if the petitioner had adequate notice of the crime charged, even if he was not surprised or put in double jeopardy by the evidence as to the two different facilities, petitioner's constitutional right would not appear to be diluted. The essence of that right is not a double jeopardy matter but a protection against being tried and convicted on any allegation other than what is precisely delineated in the grand jury's indictment.

The District Court exhibited great difficulty and concern with this *Stirone* constitutional issue. Its opinion, with which the Third Circuit exhibited no disagreement, demonstrates the continuing problems faced by lower courts in giving effect to the constitutional principle at stake. Many criminal defendants in the federal courts are faced with charges stemming from statutes of a multi-segmented nature, where it is easy for a judge or prosecutor to slide from one statutory clause or section to another. But when the grand jury has been precise in its selection of a statutory clause or phrase, at what point does an unconstitutional amendment arise? Both the lower courts and the countless criminal defendants of the future need and deserve further guidance from this Court.

3. Important problems are here raised, in light of this Court's recent Russell decision, as to the raising of due process claims respecting outrageous conduct by governmental agents.

In *United States* v. *Russell*, 411 U.S. 423, 436 (1973), a majority of this Court reaffirmed the established doctrine that "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." Any determination that the defendant had a predisposition to commit the crime and thus was not an "unwary innocent" is fatal to an entrapment claim.

The Third Circuit has here affirmed the District Court's articulated rejection of petitioner's entrapment claim, mainly on the authority of the *Russell* decision. In so doing, however, the courts below have either misinterpreted the thrust of *Russell* or exposed new and important variations on the *Russell* decision. Review of such matters is most appropriate. To be specific:

(1) The determination by the District Court that the co-defendants were predisposed to commit this hijacking effectively precludes the assertion of the entrapment defense within the contours of the *Russell* decision. But *Russell* also indicated that even where there is such a predisposition the conduct of law enforcement officers may be so outrageous, so shocking to "the universal sense of justice," that the Due Process Clause of the Fifth Amendment would bar prosecution. 411 U.S. at 431-432.

But *Russell* did not attempt to delineate the degree of outrageousness that must be found to warrant condemnation of overzealous government agents. Perhaps that

can be done only on a case-to-case basis. But, without the benefit of any guidelines from this Court, the District Court disposed of the due process claim by (1) conceding that Bush, the informer, "played a more than passive role in the commission of this crime" by disclosing the location of the truck and providing aid in removing the truck and its contents; and (2) concluding that Bush's actions involved no greater degree of governmental involvement than in *Russell* and hence did not shock the universal sense of justice. See p. 24a, *infra*.[6]

That Bush played more than a passive role is an understatement. He actively planned, directed and organized the whole operation, and agreed to share in the spoils. Does not *Russell* contemplate that such actions be evaluated with more than a comparative glance at the facts in *Russell* and by a conclusionary statement that the reviewing court is not shocked? Should there not be a more careful analysis of all the factors? What should be the controlling due process factors? Those are the questions that this case raises and that the courts below have not answered.

(2) Does *Russell* contemplate that such a due process claim cannot be raised by a defendant who had pleaded not guilty? The District Court, viewing the matter solely in terms of raising the entrapment defense, questioned whether such a defense is consistent with a denial of the acts constituting the offense charged. See pp. 18a-19a, *infra*. Even as to the entrapment defense, at least one Circuit has held that the de-

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[6] While this Court did not assess the *Russell* facts in due process terms, those facts arguably, if not clearly, show far less outrageous conduct than Bush exhibited in this case.

fense is not inconsistent with a not guilty plea. *Hansford* v. *United States,* 303 F.2d 219, 221 (D.C. Cir. 1962). But the totally unanswered problem is whether a not guilty plea precludes the due process claim referred to in *Russell.*

(3) Does *Russell* contemplate that the due process claim is to be unavailable to a defendant who plays a minor role, as an aider or abettor, in the commission of the offense? Does the right of such a defendant to raise the claim depend upon the viability of the claim as respects those co-defendants who played major and active roles in the execution of the crime? Here again, the District Court provided affirmative answers to these questions within the framework of the entrapment defense. No answers were provided within the framework of the due process claim.

It would appear that the due process problem mentioned by *Russell,* if it is found to exist in a particular case, would be such as to taint and preclude the entire prosecution by the Government. Outrageous conduct by government agents can go beyond what is commonly known as entrapment and be so shocking as to "absolutely bar the government from invoking judicial processes to obtain a conviction." *Russell,* 411 U.S. at 431-432. Cf. *Rochin* v. *California,* 342 U.S. 165 (1952). If that be true, then, the remoteness of a particular defendant from the particular events constituting the crime would not appear relevant to his right to protest the invocation of any judicial processes to obtain his conviction, whether as a principal or as an aider or abettor.

These are critical and unanswered questions arising from the *Russell* acknowledgement that due process

claims may survive an unwarranted entrapment defense. They deserve consideration and answer by this Court.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N. W.
Washington, D. C. 20036

ROY M. COHN
MICHAEL ROSEN
39 East 68th Street
New York, New York 10021

Counsel for Petitioner

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